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NO. 1198

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

GEORGE OSER, *Petitioner*

v.

CARL S. SMITH, *Harris County Voter Registrar*

SUPPLEMENTAL BRIEF OF PETITIONER, GEORGE OSER, SUBMITTED IN RESPONSE TO REPLY BRIEF OF CHALLENGER, GEORGE POLK

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TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, George Oser, submits this, his Supplemental Brief in support of his Petition for Writ of Certiorari styled George Oser, Petitioner, v. Carl S. Smith, Harris County Voter Registrar, No. 1198, in the October, 1967 term of this Court. Petitioner respectfully submits the following propositions to be true in this case:

I.

The order of the Honorable Court of Civil Appeals for the First Supreme Judicial District of the State of Texas dismissing Petitioner's appeal in the instant cause on April 11, 1968, leaves the judgment of the 164th District Court of Harris County, Texas, final under state law and permits jurisdiction in this Honorable Court under 28 U.S.C. 1257(3).

II.

The Federal questions asserted herein were raised in the trial Court in time for the Court to pass upon them.

III.

Reversal by this Court on the constitutional issue of the right to vote would virtually compel a decision in the election contest now pending that Petitioner was illegally removed from the School Board's run-off ballot.

ARGUMENT AND AUTHORITIES UNDER PROPOSITION I

The order of the Honorable Court of Civil Appeals for the First Supreme Judicial District of the State of Texas dismissing Petitioner's appeal in the instant cause on April 11, 1968, leaves the judgment of the 164th District Court of Harris County, Texas, final under state law and permits jurisdiction in this Honorable Court under 28 U.S.C. 1257(3).

In the statement of Jurisdiction (Pet. Cert. 2), Petitioner set forth Article 5.17a of the Texas Revised Civil Statutes (A. 9a), stating that in Petitioner's cause "the

decision of the district court shall be final." The Respondent herein, George Polk, by judicial admission in the court below, took the position that no further appeal could be had from the District Court's decision (Tr. 50). Respondent maintained this position in his Reply Brief herein by saying, "We do contend that he has no right of appeal under the Texas statutes." (Reply, 5). Not knowing what Respondent would contend and out of extraordinary caution, Petitioner perfected appeal in the State courts. In the face of Article 5.17a and of the foregoing, Petitioner filed a Motion to Dismiss for Want of Jurisdiction in the Court of Civil Appeals. Petitioner's Motion to Dismiss for Want of Jurisdiction was granted on April 11, 1968, and the Order of Dismissal, as duly certified, is reprinted herein (A. p. 7).

This Court held in a previous petition by a Texas voter that judgment has been rendered "by the highest court of a State in which decision could be had," where the trial court's judgment is final under state law. *Grovey v. Townsend,* 295 U.S. 45, 47 (1935). The Writ sought herein is directed to the decision of the District Court, the court specified in the statute.

ARGUMENT AND AUTHORITIES UNDER PROPOSITION II

The Federal questions asserted herein were raised in the trial Court in time for the Court to pass upon them.

As indicated in the Petition, the ruling of the Registrar cancelling Petitioner's Voting Certificate took place on November 22, 1967 (Pet. 1a, 2a). The following day being Thanksgiving, Petitioner appealed to the District Court and had a hearing on the facts on November 24,

1967 (Pet. 3a). Thereafter, after brief oral argument, the court entered a judgment, without signature of approval as to form or content by Petitioner, on December 4, 1967. Such a "judgment" in Texas law is not final nor appealable until thirty (30) days after the court enters it, according to Texas Rules of Civil Procedure, Rule 329b, which says in pertinent part:

> "5. Judgments shall become final after the expiration of thirty (30) days after the date of rendition of judgment or order overruling an original or amended motion for new trial."

On December 18, 1967, fourteen days after the rendition of judgment and within the time in which the court could substitute a new and different judgment, the court held a hearing in which Petitioner argued that an adverse decision would deny him due process and equal protection of the laws as guaranteed by the Fourteenth Amendment of the United States Constitution and that a ruling denying Petitioner the right to vote would necessarily bring the Texas voter registration law into conflict with the requirements of due process. A record of the issue raised is included in a motion filed by Petitioner and is a part of the record (Tr. 56).

Thereafter, on January 3, 1968, the court entered judgment in the cause, nunc pro tunc, which is the judgment sought to be appealed here. The judgment, nunc pro tunc, is substituted for any other order and is the final appealable judgment in any civil cause in Texas. Rule 306b, Texas Rules of Civil Procedure, sets forth as follows:

> "When a judgment or order is entered nunc pro tunc, the right of appeal shall date from the date

of rendition of the nunc pro tunc judgment or order, which shall be deemed to be the date upon which the trial judge signed the nunc pro tunc judgment or order if the date is shown therein; and the periods within which the various steps in such an appeal are to be taken shall be computed from that date."

ARGUMENT AND AUTHORITIES UNDER PROPOSITION III

Reversal by this Court on the constitutional issue of the right to vote would virtually compel a decision in the election contest now pending that Petitioner was illegally removed from the School Board's run-off ballot.

Respondent's Reply Brief points out the reason that decision by this Court is not moot:

> "Article 2776a VACS pled by Polk in his challenge provides that:
>
> > 'No person shall be elected as a trustee of a school district in this State unless he is a qualified voter.'" (Reply 12)

Petitioner's qualification as a voter is both the subject of the Petition herein and the justification given for Defendant's fait accompli in Petitioner's election contest now pending in the State district court.

Respondent points out that Petitioner is not a Negro citizen and says, therefore, that there is no "violation of his civil rights." (Reply, 3) Petitioner appealed not in his racial capacity, but as a citizen who was in all ways qualified to be a voter, but whose franchise was withheld by the arbitrary conduct of state voting officials.

It is a sad commentary on the state of the law if under the facts here presented a Negro citizen would be protected and others would not. All United States citizens, whatever their color, have the same Constitutional protections pertaining to their right to vote.

CONCLUSION

For the reasons assigned herein and in the Petition for Writ of Certiorari, No. 1198, Petitioner prays that his Petition be granted and that the writ issue to review the decision and judgment of the 164th Judicial District Court of Harris County, Texas, entered in Cause No. 750,608 on January 3, 1968.

Respectfully submitted,

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APPENDIX

No. 15320

IN

Court of Civil Appeals

HOUSTON

GEORGE OSER, Appellant,

vs.

CARL S. SMITH ET AL, Appellees.

CERTIFIED COPY OF COURT'S JUDGMENT

ROLA HAMM, Clerk

From Clerk's Office, Court of Civil Appeals, Houston, Texas.

BE IT REMEMBERED:

THAT at the term of the Honorable Court of Civil Appeals for the First Supreme Judicial District of the State of Texas, begun and holden at Houston on the 1st Monday of October, A. D. 1967, present SPURGEON E. BELL, Chief Justice, and Associate Justices TOM F. COLEMAN and PHIL PEDEN.

In the cause, GEORGE OSER, Appellant, No. 15320

vs.

From District Court of Harris County
Tr Ct #750,608
Opinion by —

CARL S. SMITH ET AL, Appellees, the following judgment was rendered on April 11, 1968:

"On this day came on to be considered appellant's motion to dismiss his appeal herein, together with the letter-reply of the contestant Polk, said motion reciting, 'Appellant states to the Court that he does not wish to further prosecute his appeal and moves that said appeal be dismissed. * * *,' and the same having been duly considered and found meritorious, it is therefore considered, adjudged and ordered that appellant's motion to dismiss his appeal herein be and the same hereby is granted; that the appellant, George Oser, and his surety, Lawyers Surety Corporation, pay all costs incurred by reason of this appeal. It is further ordered that this decision be certified below for observance."

I, ROLA HAMM, Clerk of the Court of Civil Appeals for the First Supreme Judicial District of Texas, at the City of Houston, hereby certify that the foregoing is a true copy of the judgment rendered herein by this Court in the above entitled and numbered cause as appears of record in Minute Book 15, Page 69.

IN WITNESS WHEREOF, I, hereunto set my hand and affix the seal of said Court at Houston this 15th day of April, A. D. 1968.

(SEAL)

ROLA HAMM, Clerk

By ..... Deputy